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Report and Recommendation to the MSBA

Regarding the Reporting of Professional Liability Insurance Coverage

MSBA Rules of Professional Conduct Committee April 20, 2005

RECOMMENDATIONS

RESOLVED that the Minnesota State Bar Association petition the Minnesota Supreme Court to adopt proposed Rule 10 of the Minnesota Rules on Registration of Attorneys in the form attached hereto and recommend to the Court that it adopt the proposed reporting form that follows the proposed rule and that it make the information available to the public with explanatory language such as that described below or other appropriate language.

REPORT

In August 2004, the ABA adopted a Model Court Rule on Insurance Disclosure. The model rule was sponsored by the ABA Standing Committee on Client Protection.

A joint subcommittee consisting of the five members of the Lawyers Professional Responsibility Board Rules Committee and four members of the MSBA Rules of Professional Conduct Committee met several times to discuss the ABA model rule and reported its conclusion that the MSBA Rules of Professional Conduct Committee should propose to the Assembly that Minnesota should adopt a similar rule.

Proposed Rule 10. The committee believes that Minnesota should adopt a rule requiring lawyers who represent private clients to report annually whether they carry professional liability insurance. The rule provides that this information shall be made available to the public by the Supreme Court, preferably on its web site. The committee believes that this information will be useful to consumers of legal services in selecting an attorney. The committee recognizes that there are limitations to the usefulness of the information and believes that the public should be informed of these limitations.

Reporting Form. The committee believes that the required disclosure should be part of the attorney registration renewal form. The Committee believes it is desirable to have the reporting form track the language of the rule and to keep the form as simple as possible. The form will also ask each attorney to identify his or her primary

EXHIBIT B

professional liability carrier in order to assist any verification of the form's information that may become necessary.

Making Information Available to the Public. The committee recommends that the Supreme Court should make the professional liability insurance information available to the public on its website together with an explanation that will make the information meaningful to potential clients. The website would indicate the limitations of professional liability insurance, explain the reasons why an attorney might not carry such insurance, and encourage potential clients to ask an attorney about malpractice insurance before engaging the attorney. The Supreme Court might wish to include links to other sites useful to a potential client seeking representation, such as sites for attorney referral services, pro bono legal service programs, the Office of Lawyers Professional Responsibility, and the Attorney General's Office.

PROPOSED RULE

RULE 10. REPORTING PROFESSIONAL LIABILITY INSURANCE COVERAGE

- A. Each lawyer admitted to the active practice of law shall certify to the Minnesota Supreme Court on the annual attorney registration form (1) whether the lawyer represents private clients; (2) if the lawyer represents private clients, whether the lawyer is currently covered by professional liability insurance; and (3) whether the lawyer intends to maintain insurance during the next twelve months. Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall identify the primary carrier and shall notify the Minnesota Supreme Court Attorney Registration clerk in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced without substantial interruption.

B. The Minnesota Supreme Court shall prescribe the form of certification.

Notwithstanding anything to the contrary in Rule 9 of these rules, the information submitted pursuant to this rule will be made available to the public by such means as may be designated by the Minnesota Supreme Court.

C. Any lawyer admitted to the active practice of law who fails to comply with this rule by the date that the lawyer's registration fee is due may be suspended from the practice of law until such time as the lawyer complies. Supplying false information in response to this rule shall subject the lawyer to appropriate disciplinary action.

Reporting Form. The MSBA further recommends to the Supreme Court the following language as a form that might be used to establish compliance with the proposed rule:

Do you represent private clients?* ☐yes; ☐no.

If so, are you covered by professional liability insurance? ☐yes (Carrier_____); ☐no.

If so, do you intend to maintain professional liability insurance during the next twelve months? ☐yes; ☐no.

* For the purpose of this question, the clients of government lawyers and in-house counsel are not private clients.

Proposed Means for Making Information Available to the Public. The MSBA recommends that Supreme Court make available, as a part of its information about licensed attorneys, the information reported on the reporting form, together with explanatory language such as the following or other appropriate language:

Does Your Lawyer Have Insurance?

Many lawyers have malpractice insurance. It covers claims that a client was harmed by the lawyer's mistake. Lawyers are not required to have this insurance. Each year, lawyers in private practice must tell the Supreme Court if they have this insurance. Even if a lawyer buys this

insurance, some claims are not covered. You should know these facts about lawyers' insurance:

1. **Most malpractice policies cover only claims made during the policy term.** You probably have car insurance. It covers you for accidents when the policy is in effect, even if the claim is made years later. Malpractice policies are different. If a client makes a claim after the policy ends, the claim is not covered. This is true even if the policy was in force when the claim arose or the loss happened.

2. **Malpractice policies have limits and exclusions that may be important to you.** Malpractice policies limit the amount paid on a single claim and on all claims made during the policy term. They may not cover some kinds of legal work. A lawyer who has insurance covering tax law may not be covered handling a divorce case.

3. **Malpractice policies do not cover criminal acts.** These policies cover only negligence. Negligence means failure to use ordinary care. This kind of insurance will not cover theft of money or property. Losses caused by dishonest lawyers may be covered by the Minnesota Client Security Board. Find out more at <http://www.courts.state.mn.us/csb/csb.html>.

4. **The Court does not check on insurance policies.** Lawyers report on their own policies. The Court does not check these reports. But a lawyer who makes a false report can be disciplined.

5. **A lawyer may have a good reason for not having this insurance.** If you have questions about a lawyer's insurance, ask the lawyer directly. The lawyer may be able to tell you why he or she does not carry insurance. If the lawyer has insurance, ask if it covers the kind of work the lawyer will be doing for you.

ANALYSIS

The proposed rule generally follows the ABA Model Court Rule on Insurance Disclosure. The following shows how the proposed Minnesota rule 10 varies from the ABA model rule:

A. Each lawyer admitted to the active practice of law shall certify to the ~~[highest court of the jurisdiction]~~ on or before ~~[December 31 of each year]~~; Minnesota Supreme Court on the annual attorney registration form (1) whether the lawyer ~~is engaged in the private practice of law~~ represents private clients; (2) ~~if engaged in the private practice of law~~ if the lawyer represents private clients whether the lawyer is currently covered by professional liability insurance; and (3) whether the lawyer intends to maintain insurance during the ~~next twelve months~~ period of time the lawyer is engaged in the private practice of law; and 4) ~~whether the lawyer is exempt from the provisions of this Rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity.~~ Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall identify the primary carrier and shall notify the ~~[highest court of the jurisdiction]~~ Minnesota Supreme Court Attorney Registration clerk in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced without interruption.

B. ~~The foregoing shall be certified by each lawyer admitted to the active practice of law in this jurisdiction in such form as may be prescribed by the [highest court of the jurisdiction].~~ The Minnesota Supreme Court shall prescribe the form of certification. Notwithstanding anything to the contrary in Rule 9 of these rules, the information submitted pursuant to this rule will be made available to the public by such means as may be designated by the ~~[highest court of the jurisdiction]~~ Minnesota Supreme Court.

C. Any lawyer admitted to the active practice of law who fails to comply with this rule by the date that the lawyer's registration fee is due ~~in a timely fashion, as defined by the [highest court of the jurisdiction]~~ may be suspended from the practice of law until such time as the lawyer complies. Supplying false information in response to this rule shall subject the lawyer to appropriate disciplinary action.

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The proposed explanatory language that the Court may wish to include on its website has a Flesch-Kincaid Readability Grade Level of 7.8, which means that a person with 7.8 years of education should be able to read and comprehend it. The Flesch test measures readability by creating a score that factors in word length, words per sentence, sentences per paragraph, and percentage of sentences using the passive voice. Minnesota law requires that materials prepared for public distribution by the Department of Health and the Department of Human Services be written at the seventh

grade level as measured by the Flesch test. *See* Minn. Stat. §§ 144.056, 256.016 (2004). The committee concluded that the proposed explanatory language should meet that standard, although the substance is similar to that in language proposed by the ABA Client Protection Committee (which scores 9.3 on the Flesch scale) and the North Carolina Bar Association (which scores 12.0 on the Flesch scale).

Respectfully submitted,

MSBA Rules of Professional Conduct Committee
Kenneth F. Kirwin, Chair